PHARMMALAYSIA BHD

v.

DINESH KUMAR JASHBHAI NAGJIBHA PATEL & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-22-871-2001]
8 OCTOBER 2004

CIVIL PROCEDURE: *Injunction - Mareva injunction - Stay of execution - Principles applicable - Special circumstances - Nugatory approach*

CIVIL PROCEDURE: *Execution - Stay - Mareva injunction - Principles applicable - Special circumstances - Nugatory approach*

This was a joint application by the defendants for a stay of execution of the order of this court granting Mareva injunctions in favour of the plaintiff against the defendants, pending the disposal of their appeals to the Court of Appeal. The only issue requiring determination was whether the defendants had advanced acceptable grounds to support this application.

Held (dismissing the application):

[1] The Mareva injunctions were granted to protect the plaintiff from dissipation of the assets that were the subject matter of the proceedings; hence, to grant a stay of a Mareva injunction would essentially be to frustrate the entire purpose of granting it. It would give the named defendants free rein to dispose of any assets that were the subject of the Mareva injunction. On the facts, the reasons advanced by the defendants did not fall within the context of special circumstances or the nugatory approach so as to warrant a stay of the Mareva injunctions. There were absolutely no grounds put forth by the defendants to support their application; furthermore, the mere fact that the said order continued to operate pending the outcome of the appeal could not in any way mean that the appeal would be rendered nugatory since the substratum of the appeal would not be destroyed. (pp 56 f-g, 59 b-c, 65 c-d & 66 c)

Case(s) referred to:

Bayer AG v. Winter [1985] 1 WLR 497 ***(refd)***

Canadian Pacific (Bermuda) Ltd v. Nederkoorn Pte Ltd & Anor [1992] 1 CLJ 721; [1992] 4 CLJ (Rep) 361 HC ***(refd)***

Iraqi Ministry of Defence & Ors v. Arcepey Shipping Co SA & Anor (Angel Bell) [1981] 1 QB 65 ***(refd)***

Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***

Lee Guat Eng v. Seet Tiam Hock [1974] 1 MLJ 178 ***(dist)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(foll)***

PCW (Underwriting Agencies) Ltd v. Dixon & Anor [1983] 2 All ER 158 ***(refd)***

Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 HC ***(refd)***

Zasalim Development Sdn Bhd v. Lum Siew & Sons Sdn Bhd [2002] 4 AMR 4925 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 3(2)

Other source(s) referred to:

Steven Gee QC, *Mareva Injunctions and Anton Piller Relief*, 4th edn, pp 318-319

For the plaintiff - Rabindra S Nathan (Nad Segaram & Mohd Izral Khairy); M/s Shearn Delamore & Co

For the 2nd, 3rd, 4th & 6th defendants - Jayaratnam Kumarasamy; M/s Jayaratnam & Partners

For the 5th defendant - George Varughese; M/s George Varughese & Co

For the 9th defendant - Francis Pereira; M/s Francis Pereira & Shan

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

The Stay Applications Of The Mareva Injunctions

On a joint exercise, the second defendant (Entigma Sdn Bhd), together with the third defendant (Meadow Quest Sdn Bhd), the fourth defendant (Ideaseal Trading Sdn Bhd) and the sixth defendant (Rajaram a/l Letcheminasamy) applied for a stay of execution of the order of this court dated 25 February 2004 pending the disposal of their appeals to the Court of Appeal.

On a separate exercise, the fifth defendant (Isaac Alexander Lamach) also applied for a stay of execution of the order of this court dated 25 February 2004 pending the disposal of his appeal to the Court of Appeal.

Likewise, on a separate exercise, the ninth defendant (Kaladolley a/p Francis Julious Pereira) also applied for a stay of execution of the order of this court dated 25 February 2004 pending the disposal of her appeal to the Court of Appeal.

I have since written a long judgment in regard to my decision that was handed down on 25 February 2004. That decision was in relation to the Mareva injunctions that were granted by me in favour of the plaintiff against all the defendants named in these proceedings. This is the first judgment of its kind on a stay of a Mareva injunction. I am told that I am breaking new ground.

Reasons Advanced By The Second, Third, Fourth And Sixth Defendants To Support Their Joint Applications For Stay

The reasons advanced by these named defendants – referring to the second, third, fourth and sixth defendants, may be summarised as follows:

(1) that if the stay is not granted they would suffer irreparable damage which could not be compensated;

(2) that they have always been and continue to be within the jurisdiction of this court to defend the plaintiff's claim 3 1/2 years from the commencement of the plaintiff's claim;

(3) that the receivers and managers cannot commence the suit in order to question the acts and the manner in which the directors of the plaintiff conducted the business bearing in mind that everything has been accounted and audited for;

(4) that the order of this court dated 25 February 2004 ought to be held void *ab initio justitiae*;

(5) that if the stay is not granted, they would be denied the opportunity to defend the claims brought by third parties against them;

(6) that the requirement of handing over the sixth defendant's passport to the plaintiff is contrary to law and against public policy; and

(7) that there is no necessity to hand over the sixth defendant's passport to the plaintiff because the sixth defendant has always been and will continue to submit to the jurisdiction of this court.

Reasons Advanced By The Fifth Defendant To Support His Application For Stay

The reasons advanced by the fifth defendant may be stated as follows:

(a) that there are special circumstances to warrant a stay;

(b) that there are merits in the appeal which would be rendered nugatory if the stay is refused;

(c) that the surrender of his passport and travel documents to the plaintiff would be against public policy in that the plaintiff would not be able to guarantee that those documents would not be lost, damaged or misplaced;

(d) that he is in need of his passport and travel documents in order to go overseas for his business trips and that the surrender of these documents to the plaintiff would greatly impede his travel and it would also prejudice him;

(e) that he is the Honorary Treasurer of the Kuala Lumpur Badminton Association ("KLBA") as well as a delegate of the Asian Badminton Federation ("ABF") and so he is required to attend the International Badminton Federation ("IBF") meetings in Europe during the All England and the World Badminton Championship tournaments – thus he needs his passport and travel documents to enable him to travel;

(f) that he is required to attend, at short notice, numerous other meetings in other countries which host badminton tournaments – thus he requires his passport and travel documents to enable him to travel;

(g) that it is not practical for him to give 72 hours notice to the plaintiff's solicitors before his passport is released to him when he himself has only 24 to 48 hours before he is required to leave the country to attend those meetings;

(h) that the order of surrendering his passport and his travel documents would greatly prejudice and hinder him from carrying out his business and performing his other duties;

(i) that if the stay is not granted he would not be able to attend any of the above mentioned meetings thereby rendering him incapable of carrying out his duties and this in turn would force him to relinquish his positions in KLBA and ABF;

(j) that by the order dated 25 February 2004 he is required to surrender all his charge cards, credit cards, debit cards, automatic teller machine cards, cheque books, pass books, tokens and all payment documents to the plaintiff which order is wrong in law and it is against public policy for a third party to hold all the above mentioned items as these items could easily be forged and the court too should take judicial notice of the high rate of fraud involving the above mentioned items and that the plaintiff would not be in a position to guarantee that no such fraud would take place while the above mentioned items are in their custody, care and control;

(k) that the order of the court dated 25 February 2004 only allows him to spend RM1,000 a week as living expenses and RM1,000 a week for solicitor's fees and advice;

(l) that his weekly expenditure exceeds RM1,000 which sum goes to the maintenance and upkeep of his cars and thus that sum is grossly inadequate as living expenses for him and it would also seriously affect his lifestyle;

(m) that he has instructed his solicitors to defend and sue parties owing him and his companies in other matters and thus the sum of RM1,000 is far too low and it could seriously affect and is damaging to his business;

(n) that the execution of the order dated 25 February 2004 would seriously damage his livelihood and business ventures; and

(o) that he has pleaded a set-off against the plaintiff in the sum of RM1,770,000 which is far greater than the amount claimed by the plaintiff against him and that if the set-off is allowed it would effectively extinguish the plaintiff's claim and so on this basis alone the stay should be allowed.

Reasons Advanced By The Ninth Defendant To Support Her Application For Stay

(1) that if the stay is not granted it would cause extreme detriment and irreparable damage to her which even if her appeal to the Court of Appeal is allowed she cannot restore herself to her present position;

(2) the surrendering of her:

(a) charge cards;

(b) credit cards;

(c) debit cards;

(d) automatic teller machine cards;

(e) electronic fund transfer cards;

(f) cheque books;

(g) bank account pass books;

(h) tokens;

(i) payment documents;

(j) passport; and

(k) all travel documents would seriously affect her ability to sustain herself financially and economically;

(3) that her present occupation as an insurance agent requires her to use all the above mentioned items as stated in (2) and that as an insurance agent she has committed to many of her clients to the extent that their policy payments would be advanced by her initially by way of direct debit of her bank accounts and credit cards and later her clients would pay her the required premiums at a later date; and that being the case the surrendering of her bank accounts and credit cards to the plaintiff would eventually and inevitably result in her bank accounts and credit cards to be frozen and if that happens it would affect the validity of the insurance policies of her clients;

(4) that the surrendering of all the above mentioned items as stated in (2) would directly affect her source of income since she requires those items in order to generate income for her survival as an insurance agent namely to entertain prospective clients, and that her clients or prospective clients who come to know of the court order would lose faith in her as their insurance agent and financial adviser and this would in turn affect her future income earning capacity as well as dampen any aspirations which she has in this line of work which she began after being unlawfully terminated by the plaintiff;

(5) that the order to hand over all her passports and travel documents would greatly affect her reputation as an insurance agent and it would deprive her of the opportunity of going on incentive trips upon achieving certain sale targets set by the insurance company;

(6) that the expenses of RM1,000 a week greatly affect her business and her income earning ability as an insurance agent;

(7) that if the stay is not granted it would definitely paralyse her income earning capacity and should the Court of Appeal allows her appeal it would do little to remedy the situation since the damage caused to her income earning capacity as an insurance agent would be irreparable;

(8) that the damage to her income earning ability would not only affect herself but also those who come under her care and for which she is financially responsible for, namely, an aged mother and a sister who is a single parent and her 10 year old child;

(9) that the order requiring her to surrender all the above mentioned items as stated in (2) to anyone who serves the order on her would mean that she would have to hand over those items to the despatch or service clerk from the plaintiff's solicitors law office and, consequently, it is unreasonable to require her to hand over those items to the despatch or service clerk bearing in mind that the potential of misuse and abuse of those items cannot be discounted and that any loss incurred as a result of such misuse goes far beyond any financial loss which the plaintiff can compensate; and

(10) that if the stay is allowed it would in no way prejudice the plaintiff bearing in mind that she remains within the jurisdiction of this court and there is no evidence of any attempt by her to dissipate her assets or remove her assets from the jurisdiction of this court for the last six years.

The Pertinent Question

Are these reasons advanced by them and as alluded to above fall within the context of special circumstances or the nugatory approach so as to warrant a stay? Certainly not. The onus would be on them to show special circumstances (*Zasalim Development Sdn Bhd v. Lum Siew & Sons Sdn Bhd* [2002] 4 AMR 4925, 4962 which applied *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161, FC) and, with respect, they fail to discharge that onus. I will now give my reasons.

Nature Of A Mareva Injunction

The order which I handed down on 25 February 2004 was in the nature of a Mareva injunction. The Mareva injunction is by itself a particular order – an order which seeks to freeze the assets of the party against whom it is ordered up to the maximum point as stated in the order.

The prayers that are incorporated in the order dated 25 February 2004 are nothing unusual or extraordinary. It is the usual Mareva injunction. In fact, the order reflects the standard form of the Mareva order and it incorporates all the usual safeguards that are required in a Mareva injunction.

The purpose of the Mareva injunction is to ensure that the assets of all the defendants in these proceedings in general inclusive of the named defendants in this judgment up to the sums as set out in the order are not dissipated so as to evade judgment. It has always been the law that the Mareva injunction is not intended to nor does it obstruct the ordinary business of any defendant. It must be emphasised that in every case where a Mareva injunction is granted, it is always open to any of the defendant to make an application to the court to vary the injunction so as to enable the payment of *bona fide* business debts, commitments and any other ordinary expenses. Steven Gee QC in his book entitled "*Mareva Injunctions and Anton Piller Relief*", 4th edn, made it clear at p. 318 when he wrote:

> Upon the application of the defendant or an interested third party with notice of the injunction (usually, but not invariably, a third party creditor or a bank), the court may make an order varying the terms of the injunction enabling payment to be made of *bona fide* business debts or commitments, or other expenses (eg living expenses). These may include expenses such as staff salaries, normal office expenses, payments due to trade creditors, and legal fees. Of course, the type of expenses in respect of which such a variation will be ordered depends on the circumstances of each case. Such an order has become known as an 'Angel Bell' order – a term derived from the leading case, *Iraqi Ministry of Defence v. Arcepey Shipping Company* SA (The 'Angel Bell') [1981] QB 65.

The learned author then goes on to state the procedure by which a Mareva injunction can be varied (see p. 318 spilling over to p. 319):

> The general principle is that where a party seeks a variation to the injunction to enable a payment to be made, it is incumbent on that party to satisfy the court that the proposed payment would not be in conflict with the policy underlying the Mareva jurisdiction *A v. C (No 2)* [1981] QB 961. Where the defendant is seeking the variation, it is usual for him to satisfy this requirement by swearing an affidavit deposing to the amount of the proposed payment, and the reason for making it. If the proposed payment is for a number of items, these should be identified. If the payment concerns a particular transaction between the defendant and the third party, then ordinarily the defendant will give some details of that transaction and exhibit any appropriate documents to negative any suggestion that the transaction is other than *bona fide.* Often the defendant will also disclose in his affidavit what assets he has subject to the injunction, although this is not invariably necessary.

In *Iraqi Ministry of Defence And Others v. Arcepey Shipping Co. S.A. And Another (Angel Bell)* [1981] 1 QB 65, Robert Goff J of the English High Court allowed the variation of a Mareva injunction specifically to allow a defendant to pay its debts as they fell due.

The operation of the Angel Bell order has been adopted by the High Court in Singapore in the case of *Canadian Pacific (Bermuda) Ltd. v. Nederkoorn Pte. Ltd. & Anor.* [1992] 1 CLJ 721; [1992] 4 CLJ (Rep) 361. There the learned judge said:

> The Angel Bell variation, as it has come to be known, has been treated as a proper and necessary modification to enable defendants 'to pay their trade creditors in the ordinary course as those creditors sought payment' (*K/S A/S Admiral Shipping v. Portlink Ferries Ltd.* [1984] 2 Lloyd's Rep 166 p 167) and to permit 'the payment of trade creditors in the ordinary course of business' (*Avant Petroleum Inc. v. Gatoil Oveseas Inc.* [1986] 2 Lloyd's Rep 236 at p 242). But it remains important to ensure that the right balance is preserved between the rights of the parties. The injunction must not be used so as to amount to an instrument of oppression which would bring about the cessation of ordinary trading. On the other hand, the court must have regard to the interests of the plaintiff and consider whether the variation of the injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied. The court must look at all the circumstances of the case in order to try to do justice between the parties.

A Mareva injunction too can be varied so as to permit a defendant to increase the requirements for his daily expenses. A classic example can be seen in the case of *PCW (Underwriting Agencies) Ltd v. Dixon and Another* [1983] 2 All ER 158 where the headnote at p. 158 carries the following statement of the law:

> Held – (I) The sole purpose of a Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should it be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction. The remedy was not intended to give a plaintiff priority over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action. Applying those principles to the facts, the injunction would be varied to allow the defendant sufficient funds to meet his reasonable living expenses, pay his outstanding debts and defend himself in the proceedings brought by the plaintiffs.

Flowing from all these authorities, it can safely be said that where a defendant claims that the Mareva injunction would stifle any legitimate business carried out by him, the proper course of action would be to apply to the court for a variation of the injunction furnishing the relevant details and particulars thereto for the scrutiny of the court. I now anxiously await any application by these named defendants referred to in this judgment to vary the Mareva injunctions that were granted by me on 25 February 2004. I hasten to add that the Mareva injunctions were granted to protect the plaintiff from dissipation of the assets which were the subject matter of the proceedings. And to grant a stay of the Mareva injunctions would essentially be to frustrate the entire purpose of granting it. Any stay, if allowed by this court, would give the named defendants free rein to dispose of any assets which were the subject of the Mareva injunctions. This should not be condoned. No stay should be allowed in the context of the Mareva injunctions obtained by the plaintiff. The only proper course of action would be to vary the Mareva injunctions in order to enable the payment out of legitimate debts or any legitimate expenses that might properly be incurred by the named defendants. In my judgment, to stay the Mareva injunctions would be to frustrate its entire purpose which would enable the named defendants to dissipate whatever assets which are the subject matter of the order. I strongly believe that it is for this reason that there are simply no authorities where a Mareva injunction has been granted, *inter partes*, and subsequently stayed pending appeal to the Court of Appeal. It defeats the purpose of a Mareva injunction if the stay is granted.

Requirements For A Stay Of Execution

The case of *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 AMR 2867, a decision of the Court of Appeal, has put to rest the legal requirements relating to the grant of the stay of execution. The headnotes at p. 2868 of the report should be reproduced:

> On the authorities, it would appear that it is a unanimous view that whether or not a stay of execution pending appeal should be granted, is an exercise of discretion by the court based on established principles. It further appears from the weight of the authorities that special circumstances must be special, not ordinary, common or usual circumstances and that goes to the execution of the judgment and not to the validity or correctness of the judgment or merits of the appeal. It is also a common view that merits of the appeal (or correctness or validity of the judgment) does not amount to special circumstances. It does not matter whether or not the nugatory factor is considered under the head 'special circumstances' so long as it is considered.

a The nugatory test referred to by the courts in an application for stay of execution, goes to the subject matter of the case and not the merits of the appeal. In other words, the appeal if successful, is worthless because the appellant cannot be put in its former position.

b And I accordingly apply the principles as stated in *Ming Ann* to the case at hand.

Analysis Of The Named Defendants' Contentions

I will analyse the contentions of the named defendants under the following sub-heads:

c *(a) The Rebuttals To The Contentions Of The Second, Third, Fourth And Sixth Defendants*

By way of the amended statement of claim, the plaintiff claimed against the second, third, fourth and sixth defendants the following sums of moneys:

d (i) the sum of RM5,399,100 against the second defendant;

(ii) the sum of RM8,218,000 against the third defendant;

(iii) the sum of RM600,000 against the fourth defendant; and

e (iv) the sum of RM144,000 against the sixth defendant.

The plaintiff claimed these sums of moneys because it was alleged that these named defendants received those moneys as constructive trustees. It was also alleged that these sums were indisputably received by these named defendants and that these named defendants have no right whatsoever to either receive f or retain the same. Accordingly, these sums of moneys which in law and equity properly belong to the plaintiff should be returned to the plaintiff since there were no grounds for the grant of any stay of execution. Now, in exercising my discretion whether or not to grant a stay of execution, I have to take into consideration the lack of probity on the part of these named g defendants in the context of the circumstances in which the moneys in question were received by them. The defendants, in general, have raised the issue of the validity of the debentures in their affidavits and in their submissions before me in relation to enclosure six (6). I have in my judgment in relation to enclosure six (6) categorically stated that the debentures clearly authorised the receivers and managers to institute these proceedings. In my judgment, the h receivers and managers are empowered to bring these proceedings in the name of the plaintiff in order to redress the wrongs done to the plaintiff by these named defendants. At any rate whether or not the debentures would authorise the present proceedings has absolutely nothing whatsoever to do with the present pressing issue of whether or not the order dated 25 February 2004 i

should be stayed pending appeal. This objection, frivolous though it may be, clearly relates to the merits of the appeal. It is now trite law that the merits of the appeal are not a valid ground for consideration in relation to the issue of stay.

These named defendants argued that they will suffer irreparable damage if the order dated 25 February 2004 is not stayed. With respect, there was not an iota of evidence in the named defendants' affidavits to support this flimsy allegation. During the hearing of enclosure six (6), these named defendants also alleged that they would suffer irreparable damage if the order dated 25 February 2004 was granted. But no evidence at all of the irreparable damage was adduced before the court then and even now there are no evidence whatsoever before this court as to what businesses these named defendants are legitimately conducting. On the other hand, the plaintiff by way of exh. "KT3" of encl. 7 has adduced evidence that:

(i) the second defendant is a dormant company; and that

(ii) the third and fourth defendants are mere shell companies with a paid up capital of RM2.

The plaintiff has in relation to enclosure six (6), put these named defendants to strict proof thereof but they failed to adduce a shred of evidence as to what businesses they are engaged in. On this ground alone, the stay applications of these named defendants should be dismissed forthwith.

The fact that the order dated 25 February 2004 was granted three (3) years after enclosure six (6) was filed was certainly irrelevant to the issue of whether or not the stay should be granted. The delay in the hearing of enclosure six (6) was wholly beyond the control of the plaintiff and cannot be a ground for the grant of a stay of execution.

It was argued that the receivers and managers have no cause of action whatsoever. This argument overlooked the fact that the receivers and managers were not bringing this action in the name of the receivers and managers but rather in the plaintiff's name. In any event, the receivers and managers act as the agent of the borrower and was empowered to do all such acts as the borrower was at law entitled to do. As the borrower, the plaintiff was entitled to commence legal proceedings against these named defendants and the fact that these proceedings were instituted by the receivers and managers on behalf of the plaintiff was totally irrelevant.

Again, the contention that the receivers and managers can only deal with the charged properties would also be irrelevant and baseless. In fact, the receivers and managers have the power to "carry on, manage, develop, reconstruct, amalgamate or diversify the business of the borrower" and this must surely include the incidental power to bring and institute such legal actions as are necessary in the name of the borrower.

In regard to the purported claims by third parties, there was no evidence to show that such claims by third parties have been instituted against these named defendants. Even if there was such a claim, which was denied by the plaintiff, it was always open to these named defendants to apply to vary the terms of the Mareva injunctions. To date, these named defendants have not done so.

The sixth defendant argued that it was against the law to deliver up his passports. That cannot be right. I have in my earlier judgment referred to the case of *Bayer AG v. Winter* [1985] 1WLR 497 as the pertinent authority for the delivery up of passports. At any rate, the issue of whether the law permits the delivery up of passports in support of and in connection with a Mareva injunction relates entirely to the merits of the appeal and has no bearing whatsoever on whether or not the order dated 25 February 2004 should be stayed.

For all these reasons, the second, third, fourth and sixth defendants' joint applications for a stay should be dismissed with costs.

(b) The Rebuttals To The Contentions Of The Fifth Defendant

In regard to the issue of the delivery up of the fifth defendant's passport, reference to the case of *Bayer AG v. Winter (supra)* should once again be made. As I said this issue relates to the merits of the appeal and thus it has no bearing whatsoever to the application for a stay.

In regard to the fifth defendant's need to travel, this can easily be resolved. All the fifth defendant needs do is to file an application with supporting affidavit evidence to justify his need to travel and this court would hear the application. A Mareva injunction once issued, by its very nature, cannot be stayed. It can only be varied on justifiable grounds.

The issue of whether or not public policy permits the delivery up of the fifth defendant's credit, debit and charge cards and other financial documents is not relevant to the stay application. Again, the contentions relating to the fifth defendant's living and business expenses are also irrelevant to the stay application. The proper course of action would be to seek to vary the order dated 25 February 2004.

In regard to the issue of whether or not the fifth defendant has a set-off against the plaintiff, it is wholly irrelevant to the stay application. In fact, the issue of a set-off relates to the merits of the appeal and it should not be considered as a valid ground for the grant of the stay of the Mareva injunction.

Reliance by the fifth defendant on the case of *Lee Guat Eng v. Seet Tiam Hock* [1974] 1 MLJ 178 was certainly misplaced. That case relates to the issue of whether or not the summary judgment granted in favour of the plaintiff there should be stayed pending the determination of the counterclaim in accordance with O. 14 r. 3(2) of the Rules of the High Court 1980 ("RHC"). In any event, the stay under O. 14 r. 3(2) of the RHC was granted by the court there at the actual hearing of the summary judgment application and not pursuant to an application for a stay of execution made post judgment. Here before me, the Mareva injunction was granted on 25 February 2004 and the fifth defendant has applied to stay that Mareva injunction and that makes this case a world apart from that of *Lee Guat Eng (supra)*.

It was argued that the fifth defendant's spending expenses and business activities would be crippled by the Mareva injunction. But, unfortunately, the fifth defendant's supporting affidavit failed to adduce any evidence at all in regard to the ordinary living expenses or the business activities of the fifth defendant. So, it can be surmised that these were mere bare allegations unsupported by any evidence. Be that as it may, the appropriate course of action would be for the fifth defendant to vary the Mareva injunction in order to suit his life style and business activities.

Going on an uphill task, the arguments that the plaintiff had failed to meet the pre-requisites for the grant of the Mareva injunction and that the plaintiff also failed to adduce evidence of dissipation of assets went to the merits of the fifth defendant's application for a stay and so they must be ignored as being wholly irrelevant.

At the end of the day, there were absolutely no grounds demonstrated by the fifth defendant in order to warrant a stay of the Mareva injunction. The discretion to grant a stay of execution can never be exercised in favour of the fifth defendant based on the facts of this case. It must be emphasised that any application to vary the Mareva injunction must be grounded on solid evidence and nothing else. All the issues raised by the fifth defendant relate to the merits of the appeal and at the same time it challenged the validity of the Mareva injunction.

For the reasons adumbrated above, the fifth defendant's application for a stay should be dismissed with costs.

(c) The Rebuttals To The Contentions Of The Ninth Defendant

The reasons advanced by the ninth defendant to support her application for a stay relate to the usual circumstances surrounding the Mareva injunction and they cannot be said to be special or extraordinary. For a stay to be granted, the "special circumstances must be something distinctive and out of the way" (*Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353).

By its very nature, the Mareva injunction is a stringent remedy. But there are safeguards. They can be varied on justifiable grounds. But the fact remains that there are no reported decisions in Malaysia where Mareva injunctions have been stayed merely on the ground that the terms of the Mareva injunctions are too stringent.

The general principles from the authorities clearly show that issues such as fear of losing, fear of losing business, fear of losing customers, and fear of not being able to collect debts from third parties are entirely irrelevant in the context of whether or not a stay of execution should be granted *(Ming Ann (supra))*. Of utmost importance would be this. The ninth defendant merely alleged without providing any supporting evidence at all. Thus, the submissions that the Mareva injunction would affect the ninth defendant's business and ordinary living expenses were unsupported by any evidence at all. The ninth defendant failed to furnish details of her business ventures. Indeed if the ninth defendant was engaged in a legitimate business venture or if the sums stipulated in the order dated 25 February 2004 would severely affect her living expenses, she could apply to vary that order. The complaints advanced by the ninth defendant relate to the merits of the order dated 25 February 2004. These complaints should be advanced by the ninth defendant when she files her application to vary the Mareva injunction.

By way of a summary, I have this to say:

(1) That the ninth defendant had not adduced any evidence at all of any potential damage or hardship that would allegedly be suffered by her. There is simply no available material before this court to enable this court to exercise the jurisdiction to grant a stay of the Mareva injunction.

(2) The ninth defendant is not entitled to those sums of moneys which are the subject matter of the Mareva injunction. These are monies which rightly belong to the plaintiff and which the ninth defendant has no right to retain. Accordingly, the ninth defendant cannot complain as to the operation of the order dated 25 February 2004 in regard to the monies that were due from her to the plaintiff.

(3) In any event and at any rate whatever grievances the ninth defendant may have in regard to the terms of the Mareva injunction she can easily overcome them by applying to vary them.

(4) The acts and consequences complained of by the ninth defendant merely relate to the usual prayers found in a Mareva injunction. There is nothing unusual or extraordinary in relation to the circumstances of the order dated 25 February 2004.

(5) It cannot be argued that the appeal would be rendered nugatory if the ninth defendant were to be successful in her appeal. If the appeal were to be successful then the only consequence would be that the order dated 25 February 2004 would cease to be in force. The mere fact that the order dated 25 February 2004 continues to operate pending the outcome of the appeal cannot in any way mean that the appeal would be rendered nugatory. The substratum of the appeal would not be destroyed. Similarly neither could it be argued that the appeal would be rendered academic in any way. These observations should also apply to the second, third, fourth, sixth and fifth defendants also.

(6) The issue of delay is not relevant when one considers the issue of whether the order dated 25 February 2004 should be stayed. At the most, delay would relate to the validity or correctness of the order dated 25 February 2004. In any event, as alluded to in my earlier judgment, any delay (if at all they exist) has been satisfactorily explained.

(7) All the issues pertaining to the ninth defendant's business activities as an insurance agent and her personal expenses should properly be ventilated by way of a variation to the order dated 25 February 2004. The ninth defendant has not seen it fit to make any application to vary the said order.

(8) The ninth defendant's contention that the appeal would be rendered nugatory if the stay is not granted is clearly unsustainable. The ninth defendant's appeal to the Court of Appeal relates to the issue of whether or not the order dated 25 February 2004 was properly and correctly granted. The mere fact that the ninth defendant has to comply with the said order until the hearing and disposal of the appeal cannot in any manner render the appeal nugatory. If the Court of Appeal were to reverse my decision, then the only effect would be that the order dated 25 February 2004 would cease to operate. The substratum or the subject matter of the appeal would not be destroyed in any manner.

(9) The alleged hardship to the ninth defendant as a result of complying with the order dated 25 February 2004 cannot in any way render the appeal nugatory. With respect, the issue of hardship do not affect the substratum of the appeal or that it would render the outcome of the appeal in any way academic.

I must, for the above reasons, dismiss the ninth defendant's application for a stay with costs.

Conclusion

No acceptable grounds in the context of the special circumstances and the nugatory approaches have been advanced to support the second, third, fourth, and sixth defendants' joint applications for a stay. No acceptable grounds too in the context of the special circumstances and the nugatory approaches have been advanced separately by the fifth and ninth defendants. Consequently, their applications for stay must be dismissed with costs.